BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JIMMY RAY WINKLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,043,206
CESSNA AIRCRAFT COMPANY	)	
Self-Insured Respondent	)	

ORDER

Claimant and respondent appeal the February 19, 2009, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was denied benefits after the ALJ determined that claimant had failed to prove that he suffered a work-related injury on the alleged date of accident, and that claimant had failed to provide timely notice of that accident, with no just cause for extending the time to provide notice. Respondent was ordered to pay the medical expenses of George G. Fluter, M.D., as an unauthorized medical expense.

Claimant appeared by his attorney, Michael L. Snider of Wichita, Kansas. The self-insured respondent appeared by its attorney, Vincent A. Burnett of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held February 19, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Does the incident which occurred on October 19, 2008, constitute a compensable accident under the Kansas Workers Compensation Act?

2. Did claimant provide timely notice of this accident? If not, was there just cause for claimant's failure to timely notify respondent of the

accident? In the alternative, did respondent have actual knowledge of the accident sufficient to render the giving of notice unnecessary?

3. Did the ALJ err in ordering respondent to pay unauthorized medical expenses for an accident which was determined not to have arisen out of and in the course of claimant's employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed with regard to whether claimant suffered an accidental injury which arose out of and in the course of his employment with respondent, but reversed with regard to the award of an unauthorized medical allowance.

Claimant, a 16-year employee of respondent, was working as a flight line mechanic on October 19, 2008, at about 5:30 a.m., when the airplane in which he was working began to roll and struck another airplane, causing extensive damage to both airplanes. Both claimant and his lead man were terminated due to the amount of damage caused to the airplanes. Claimant testified that he was looking down, while checking the brakes on the airplane, and was not aware that the airplane was moving. When he looked up, he realized the airplane was about to hit another airplane. He pushed on the rudder to try to turn the airplane, but the wing tip of his airplane struck the fuselage of the other airplane. Claimant was not wearing a seat belt and testified originally that he was jerked by the impact. Later, during preliminary hearing testimony, claimant stated that he was thrown or slammed into the "steering wheel" of the airplane. When claimant left the airplane, he did not notify respondent or any of his supervisors of any injuries from this incident.

After claimant left the airplane, he was sent for drug and alcohol testing, which came back clean. Claimant's foreman, Tim Hammond, reported the incident to Ruth Cronwell from human resources. Claimant was sent home at about 7:00 a.m. on the date of the incident. Later that night, claimant was advised that he had been suspended due to the incident. At various times, claimant met with a foreman, Rob Billen; Mr. Hammond; a union representative identified as Auggie; Ms. Cronwell; and other unidentified union representatives. Claimant acknowledges that he failed to notify respondent of the alleged injuries during any of these meetings. He was contacted by a union representative on October 31, 2008, and advised that the termination decision had been made. Claimant received the actual termination notice on November 1, 2008. Notice of the accident and the involvement of injuries from that accident were provided to respondent on November 24, 2008.

Claimant first sought medical treatment with his family physician, Mueeza Zafar, M.D., on November 12, 2008. At that time, claimant was referred for x-rays of the cervical spine, followed by an MRI scan of the cervical spine on November 13, 2008. Claimant was diagnosed with mild disc bulging at C4-5 with spondylosis at the same level causing mild foraminal narrowing. Claimant was apparently upset that an MRI was not done of the lumbar spine, but due to prior low back surgery involving instrumentation, an MRI was not recommended. At the preliminary hearing, claimant testified to having pain in the back of his head, a stiff neck, low back pain, left hand numbness, numbness in his left leg and the recent development of numbness in his right hand. At the preliminary hearing, claimant through his attorney denied preexisting disc problems at C4-5. However, medical records, including an MRI from 1998, indicate left posterior lateral protrusion at C3-4, C4-5 and C5-6, with degenerative changes.

Claimant was referred to orthopedic surgeon John P. Estivo, D.O., for an examination on January 23, 2009. The history provided to Dr. Estivo detailed a very long history of neck and back problems, beginning as early as 1992 (neck) and 1994 (back). The history detailed a medical history far too extensive to repeat herein. Claimant suffered prior injuries to his cervical spine, lumbar spine, right elbow, and bilateral shoulders, arms and hands, including a fusion of the lumbar spine in 2002 at L4-5 and L5-S1. As indicated above, an MRI in 1998 revealed protruding disks at C3-4, C4-5, and C5-6 with degenerative changes.

Claimant's history to Dr. Estivo indicated the airplane was moving at a very slow pace, approximately two miles per hour. However, this is disputed by claimant. The physical examination by Dr. Estivo found full range of motion in the cervical spine, and overreaction to touch at the cervical spine. Claimant was post lumbar fusion at L4-5, L5-S1, with the fusion read as being solid. The examination was described as normal, with inconsistences in claimant's examination pattern. Dr. Estivo opined that claimant had suffered no injuries related to the incident of October 19, 2008. If claimant had any abnormalities, they were related to claimant's preexisting conditions.

Claimant was referred by his attorney to pain specialist George G. Fluter, M.D., for an examination on January 12, 2009. Dr. Fluter was also provided medical records from claimant's long history of injuries, although Dr. Fluter's records appear to only go back to 2000. Dr. Fluter's examination found limited range of motion in claimant's cervical spine in all planes. Claimant was diagnosed with cervical strain/sprain, lumbosacral strain/sprain, probable left trochanteric bursitis, possible left upper extremity peripheral nerve dysfunction, and possible left lower extremity peripheral nerve dysfunction. An MRI done on November 13, 2008, displayed disc bulging at C4-5 with spondylosis and mild bilateral foraminal narrowing. Dr. Fluter found a causal/contributory relationship between claimant's current condition and the injury of October 19, 2008.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

Claimant alleges an accidental injury which arose out of and in the course of his employment on October 19, 2008, yet did not report the injuries until November 24, 2008. Even with the multiple meetings with his foreman, the union representatives, and Ruth Cronwell, claimant failed to inform respondent or any union representative of the alleged injuries for over one month. There is no explanation for this delay. Claimant also provides multiple descriptions of the actual injury mechanics, with conflicting descriptions being provided at various times in the preliminary hearing and to the doctors who evaluated claimant. With conflicting evidence, the determination is often made by the ALJ based on the ability to evaluate witness credibility. Here, the ALJ apparently found claimant's credibility lacking. This Board Member finds that claimant has failed to prove that he

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[1] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2008 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

suffered an accidental injury which arose out of and in the course of his employment with respondent. This finding renders the remaining issues moot.

K.S.A. 2008 Supp. 44-510h(b)(2) states:

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

The allowance of an unauthorized medical allowance is a benefit available under the Kansas Workers Compensation Act (Act) for a worker who has suffered a work-related injury. Here, claimant has failed to prove the relationship between his alleged injuries and the incident on October 19, 2008. This disqualifies claimant from benefits under the Act. Therefore, claimant would not be entitled to the unauthorized medical allowance. The Order of the ALJ is reversed on this issue.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with respondent. Based on that finding, the decision by the ALJ to deny claimant benefits is affirmed. However, the Order of the ALJ is reversed with respect to the award of an unauthorized medical allowance.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated February 19, 2009, should be, and is hereby, affirmed with regard to whether claimant suffered an accidental injury

[5] K.S.A. 44-534a.

which arose out of and in the course of his employment with respondent, but reversed with regard to the award of an unauthorized medical benefit.

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

HONORABLE GARY M. KORTE

c: Michael L. Snider, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge